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No. 112 MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

LOYD CARROLL GRANDSINGER, Petitioner

v.

STATE OF NEBRASKA, Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska

Counsel for Petitioner

Eugene D. O'Sullivan, Sr.
278 Aquila Court Building
Omaha 2, Nebraska

James A. Lake, Sr.
4603 Bryan Circle
Lincoln 6, Nebraska

Of Counsel

Arthur Lazarus, Jr.
Richard Schifter
Association on American Indian Affairs
1700 K Street, N. W.
Washington 6, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. _____

LOYD CARROLL GRANDSINGER,
Petitioner

v.

STATE OF NEBRASKA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Loyd Carroll Grandsinger prays that a writ of certiorari issue to review the judgments of the Supreme Court of Nebraska, entered in the above-entitled case on February 11, 1956 and June 30, 1956.

CITATIONS TO OPINION BELOW

The only written opinion of the Supreme Court of Nebraska, a copy of which is appended hereto, is reported in 161 Neb. 419, 73 N. W. 2d 632 (1955).

JURISDICTION

The opinion of the Supreme Court of Nebraska was filed on December 16, 1955. A motion for rehearing was denied on February 11, 1956. On May 3, 1956, Mr. Justice Clark extended the time to file the petition for a writ of certiorari to and including July 10, 1956. On the same day Mr. Justice Clark stayed petitioner's execution pending the final disposition of the petition for certiorari. On June 18, 1956, the Supreme Court of Nebraska granted a motion for leave of court to file an amended and supplemental motion for rehearing out of time. On June 30, 1956, the amended and supplemental motion for rehearing was denied. The jurisdiction of this court is invoked under 28 U. S. C. Section 1257(3).

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QUESTIONS PRESENTED

1. Was petitioner, a defendant in a state capital case, denied due process under the Fourteenth Amendment to the United States Constitution:

(a) Where defense counsel was caught during the trial tampering with evidence introduced in the case by the State, was forced to confess his criminal misconduct in open court before the jury, thereby debasing and disgracing himself and his much harried client, and thus placing himself in a situation in which his own interests in protecting his professional future were adverse to the duties he owed his client, and where this conflict of interest prevented him from giving petitioner effective and unqualified representation by counsel; and/or

(b) Where the exploitation of defense counsel's misconduct by the prosecutor and trial court, coupled with defense counsel's general incompetence, particularly in failing to make proper and adequate objections in preserving federal questions for review, and other misconduct of the prosecutor and the failure of the trial court to protect petitioner's essential rights, deprived petitioner of a fair trial.

2. Did the admission and use of petitioner's confessions constitute a denial of due process under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America, Article XIV, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Nebraska Revised Statutes, Section 28-401:

"Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * every person so offending shall be

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deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

Nebraska Revised Statutes, Section 29-401:

"Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this state, * * * until a legal warrant can be obtained."

Nebraska Revised Statutes, Section 29-406:

"The warrant shall be directed to the sheriff or to any constable of the county, * * * and, reciting the substance of the accusation, shall command the officer forthwith to take the accused and bring him before the magistrate or court issuing the warrant, or some other magistrate having cognizance of the case, to be dealt with according to law, * * *"

STATEMENT

Petitioner and his brother were stopped by two officers on a lonely country road in the very rough and thinly inhabited ranch area near Valentine, Nebraska, about 11:30 p.m. on Thursday, April 8, 1954. In the ensuing melee, before other officers arrived from a nearby roadblock, numerous shots were fired, petitioner escaped into the darkness, his brother surrendered, and, a few moments later, one of the officers was found to have been shot and killed. The next morning a posse of three or four hundred men was organized, and at 3 p.m. that afternoon, Friday, April 9, 1954, petitioner was captured after he was nearly drowned trying to swim across the Niobrara River. He was taken immediately to Valentine, Nebraska for questioning, signed a confession at 9 that evening, was questioned most of the rest of that night, made another statement at the scene of the crime at noon the next day, Saturday, April 10, 1954, and signed another confession about 9 p.m. on Sunday, April 11. A warrant for his arrest was issued on Monday, April 12 (Tr. 6), and on that day, as yet unrepresented by counsel, he was arraigned, pleaded "not guilty," and waived a preliminary hearing (Tr. 8).[1] Petitioner was

1. Throughout this petition the abbreviation Tr. refers to the typewritten transcript; the abbreviation Ex. refers to the Exhibits in the case; and the abbreviation B. E. refers to the typewritten Bill of Exceptions.

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not allowed to contact relatives or a lawyer until "a couple of days" after the preliminary hearing (B. E. 550).

On June 2, 1954, petitioner went on trial for first degree murder before a jury in the District Court of Cherry County, Valentine, Nebraska. (Tr. [illegible] During the trial the state introduced petitioner's confession of Friday, April [illegible] (Ex. 19; B. E. 650), and his confession of Sunday, April 11 (Ex. 23; B. E. [illegible]). Evidence was taken out of the hearing of the jury as to the circumstances surrounding the confessions. The trial court held that they were not inadmissible as a matter of law (B. E. 581), and the confessions of April 9th and April 11th were thereafter submitted to the jury. A state's witness was also permitted to read a statement of petitioner taken at the scene of the crime on Saturday, April 10, which the witness had transcribed but which petitioner had not read or signed (B. E. 669-700). Petitioner took the stand in his own defense and throughout asserted his innocence.

On the tenth day of the trial, after the evidence was all in and just before final arguments to the jury, an episode took place which is of such importance in this case that it is reproduced in full (B. E. 1234-1235):

"BY MR. CLARKE [special prosecutor]:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

THE COURT: Very well.

MR. CLARKE: We wish the record to show that counsel for the defendant, is willing that is shall show, that this morning [sic] in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of the counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently--

MR. FISHER: (Interrupting) I didn't violently push it--

MR. CLARKE: (Interrupting) pushed it through the hole in the belt hard

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enough so that it materially enlarged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

(Mark this dowel as an exhibit, please.)

(The wooden dowel referred to was marked as Exhibit No. 75.)

THE COURT: Mr. Fisher, as I understand it you have told counsel that you did that?

MR. FISHER: Yes.

THE COURT: You recognize that the hole is larger?

MR. FISHER: Yes.

THE COURT: The court admonishes all counsel and everyone else and the jury when they go to deliberate upon this matter to not probe these exhibits. They can make comparisons but they cannot probe these belts with any dowel or change the condition of any exhibits. Very well, you may proceed."

Immediately after this episode Mr. Fisher, defense counsel, made the final argument to the jury on behalf of petitioner. The jury found petitioner guilty of murder in the first degree and set the penalty at death. (Tr. 75) A motion for a new trial was denied (Tr. 90), the Nebraska Supreme Court affirmed the conviction on December 16, 1955 (see opinion appended hereto), and a motion for rehearing was denied on February 11, 1956.

HOW FEDERAL QUESTIONS WERE PRESENTED

Until after the denial of the first petition for rehearing in the Nebraska Supreme Court, petitioner was represented by Mr. Fisher, the attorney involved in the episode quoted above, and the federal questions presented herein were not raised for the obvious reason that that counsel was in no position to advance his own criminal misconduct as grounds for a new trial. After present counsel entered the case, the federal questions were raised by petitioner by an amended and supplemental motion for rehearing. On June 11, 1956, petitioner filed with the Nebraska Supreme Court a motion for leave to file an amended and supplemental

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motion for rehearing, in which petitioner asked the Nebraska Supreme Court to review only the same federal questions presented here. (Tr. unpaged) A copy of this typewritten motion for leave is in Appendix A. On June 18, 1956, the Nebraska Supreme Court granted the motion for leave to file, thereby resolving in petitioner's favor the question of state procedural law as to whether or not the federal questions could be presented for decision in a second petition for rehearing filed out of time. On the same day petitioner filed his amended and supplemental motion for rehearing and supporting brief, a copy of which is appended hereto as Appendix B. The motion for rehearing again raised no issue except the same federal questions presented herein, and since the Nebraska court had already ruled that the motion could be filed, the motion raised no points for decision except the merits of the federal questions. On June 21, 1956, oral argument was had, solely directed to the federal questions which were the only issues presented for decision in the motion. On June 30, 1956, the motion for rehearing was overruled by the Supreme Court of Nebraska, the highest court in the state.

Under Nebraska criminal procedure, an amended and supplemental motion for rehearing, filed after leave of court is first obtained, is a proper way to raise federal questions under the Fourteenth Amendment. The Nebraska Supreme Court, by granting permission to file the amended motion, brought before the court and expressly decided the federal questions.

Furthermore, petitioner was prevented from raising the federal questions earlier because the issues were based on the confessed criminal misconduct of petitioner's trial counsel who thereafter represented him. The federal questions were thus raised at the earliest opportunity and in the only way provided by Nebraska procedural law, and the denial of the amended and supplemental motion for rehearing was an express decision by the highest court in Nebraska adverse to the merits of the federal question.

REASONS FOR GRANTING THE WRIT

Summary

The general areas of law involved in the questions presented in this petition--right to counsel in state capital cases and the use of allegedly coerced confessions--

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are familiar and important sources of litigation in this Court. But the precise questions presented by this petition have never been settled by this Court. Their resolution affects not only petitioner, who is now under sentence of death in the Nebraska penitentiary, but is important in the administration of the criminal law.

It was established in Powell v. Alabama, 287 U. S. 45 (1932), that the right to counsel in state capital cases means that the assistance of counsel must be effective and not a mere sham. It is established in federal law by Glasser v. United States, 315 U. S. 60 (1942), that if counsel is handicapped by a conflict of interest which prejudices his defence of his client, such representation by counsel does not meet minimum constitutional standards for effectiveness under the Sixth Amendment. This case poses the question of whether or not the rule of the Glasser case also applies to the right to counsel under the Fourteenth Amendment in state capital cases. If the Glasser case is applicable, it is believed that the judgment of the Nebraska Supreme Court of June 30, 1956, is clearly erroneous, for counsel in the instant case was wholly disabled from protecting his client's interests and petitioner was severely prejudiced as a result. The Nebraska judgment in this case apparently rests upon the premise that the Glasser case is inapplicable to state capital cases and that the right to counsel under the Fourteenth Amendment involves a different and lesser standard of what constitutes "effective" assistance of counsel than applies under the Sixth Amendment. The question of whether it is correct that the Fourteenth Amendment contemplates a lower standard in the calibre of representation of state defendants charged with capital crimes than is required for all federal defendants is one of far reaching importance.

Whether the admission and use of confessions obtained under circumstances disclosed by the record in the instant case denied petitioner due process of law likewise presents an undecided question. Prior decisions of this Court have settled that when the pressure to confess, whether physical or mental, exerted against a defendant is so great that it wears away the defendant's resistance, a resulting confession is involuntary and its use deprives the defendant of due process of law. But the cases previously decided by this Court have involved circumstances in which a defendant's resistance was worn away by prolonged official questioning

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after he had been taken into custody. While that circumstance is also present in the instant case, because the undisputed evidence shows petitioner was subjected to prolonged and intensive police interrogation while he was being held incommunicado in illegal detention, the instant case presents undisputed testimony which shows that petitioner's normal mental faculties had been largely destroyed, mostly by long exposure to the elements of nature, before the interrogation ever started. When petitioner was led into the Valentine, Nebraska courthouse for the first twelve hours of intensive questioning, he was already in a state of fear and physical exhaustion. He had been without food and sleep for more than 24 hours, running from a heavily armed posse through rugged Nebraska sandhill terrain for nearly 16 hours, had nearly drowned trying to swim a swift flowing river just before his capture, had been shot at after he had surrendered and threatened with lynching after he was in custody, and was intimidated by crowds of armed men swarming around him at the scene of his capture and at the courthouse. The issue that is posed, therefore, is whether or not such circumstances are to be considered in determining whether petitioner's confessions were voluntary, when they arose prior to the initiation of actual interrogation. It is submitted that petitioner's physical and emotional condition at the time of his capture is a relevant circumstance in the determination of whether his subsequent confessions were voluntary, that these circumstances in conjunction with the uncontroverted evidence concerning petitioner's prolonged interrogation clearly demonstrate that his confessions were involuntary as a matter of law, that no man should be put to death as a result of a conviction obtained largely through the use of such confessions, and that since the situation is one which is likely to recur the question ought to be settled by this Court.

QUESTION 1

The judgment of the Supreme Court of Nebraska denying the amended motion for rehearing is in apparent conflict with the decision of this Court in Glasser v. United States, 315 U. S. 60 (1942). The Glasser case, and decisions of the Courts of Appeal following it, have established the rule that in federal cases the right to counsel established by the Sixth Amendment requires that counsel not have a

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conflict of interest which would prejudice the defense of his client. While this precise question has not arisen in cases construing the right to counsel under the due process clause of the Fourteenth Amendment in state capital cases, the nature of the right to counsel where required in state cases by federal due process is substantially equivalent to the right to counsel in federal cases under the Sixth Amendment. The requirement that representation of counsel can not be a mere sham but must be "effective" arose in a state capital case, Powell v. Alabama, 287 U.S. 45 (1932), and it is inconceivable that the Glasser holding that assistance of counsel is not "effective" when counsel is disabled by a conflict of interest would not be applicable in state capital cases. That there is still uncertainty on this point, however, is indicated by the judgment of the Nebraska Supreme Court in this case, and this emphasizes the importance of settling this question by a decision of this Court and of implementing the requirement of Powell v. Alabama, supra, that the assistance of counsel be effective.

If the Glasser case is applicable, as we believe it to be, the judgment in the instant case is in direct conflict with it. In the Glasser case, an associate counsel employed to represent Glasser was also appointed by the court to represent a co-defendant, and a conflict of interest arose over the admission of evidence prejudicial to Glasser but favorable to the co-defendant. In the instant case, when the court and prosecutor forced defense counsel to confess his criminal misconduct before the jury, the consideration which diverted counsel from his duty to his client was not merely a conflicting obligation to another client but the threatened destruction of counsel's own legal career and serious fines and jail terms.

Under the prosecution's theory of the shooting in the instant case, the question of whether or not the deceased patrolman was killed with a .22 or .38 calibre gun was a crucial fact, and the size of the hole in the victim's belts were the only tangible evidence on that point. When defense counsel was caught tampering with the pants belt and trying to enlarge the bullet hole, he found himself in a desperate predicament. His action was a criminal contempt of the trial court, Neb. Rev. Stats. § 25-2121 (Reissue 1948), and as such was a

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serious offense punishable by fine or imprisonment, see, e.g., McCauley v. State, 124 Neb. 102, 245 N. W. 269 (1932); and was a crime under Nebr. Rev. Stats. § 28-737 (Reissue 1948), which makes it a misdemeanor to "obstruct or impede . . . the due administration of justice. . . ." Under these circumstances it is understandable why counsel, when the court and prosecutor forced him to confess his crime before the jury, abandoned his obligations to his client in a desperate effort to save himself from threatened disbarment and criminal prosecution.

That the disclosure to the jury of what counsel had done would have been overwhelmingly prejudicial to his client must have been apparent to counsel. Yet he made no attempt to withdraw from the case or have the situation handled in a way that would protect his client by keeping from the jury the highly prejudicial but irrelevant fact that counsel had committed and confessed to this crime. He not only did not object, but he was "willing that . . . [the record] should show" what had taken place. He requested no instruction that the jurors should disregard his conduct and not impute his dishonesty to his client, and no such instruction was given by the court on its own motion. The only explanation for this remarkable disregard of his client's rights is that counsel's overriding instinct for professional self-preservation and his desire to avoid a fine and a jail term, if possible, made him unwilling to antagonize the prosecutor or stand up to the court. When the prosecutor and court forced counsel to confess before the jury, weakened and willing counsel confessed. Thus the case is squarely within the Glasser rule, which comes into operation when, because of conflicting obligations, "it was impossible for the trial attorney to have given defendant the undivided and undiluted fidelity to which he was entitled." Scott v. District of Columbia, 99 A. 2d 641 (D. C. Mun. Ct. App. 1953), aff'd, 216 F. 2d 860 (D. C. Cir. 1954).

In the Glasser case this Court said that it was "unnecessary" to determine the precise degree of prejudice which resulted from counsel's conflict of interest because "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." 315 U. S. 60 at 75-76. In the instant case, however, the prejudice to the defendant was overwhelming. The evidence was close, with much of the

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state's case resting on disputed alleged "confessions." Yet at the climax of the trial, when the evidence was in and the jury was prepared to hear arguments of counsel, the effectiveness of counsel was destroyed. From the moment when the tampering with the evidence was brought to the attention of the jury defense counsel ceased to be able to aid his client and instead became an onerous and oppressive liability. In a case such as this which turned largely on circumstantial evidence since there were no eye witnesses to the crime and neither the fatal bullet or the murder weapon was ever found, petitioner needed an attorney to evaluate the evidence, point out inconsistencies, and draw inferences in petitioner's favor from the evidence. But what juror could listen with an unprejudiced mind to a man who, just before he was to argue the case for his client, stood before him in open court and was forced to abjectly confess his grievous guilt and reckless dishonesty? Because a Nebraska jury fixes the punishment if it is to be death, the closing argument by a counsel unclouded by his own immoral and criminal acts is of the utmost importance. From this point on, petitioner was denied the assistance of counsel required in state capital cases under the due process clause of the Fourteenth Amendment.

Not only did petitioner's counsel condone this criminal activity, but the special prosecutor brought the fact forcefully to the knowledge of the jury, and the trial judge did nothing to caution the jury concerning it. The prosecutor's exploitation of defense counsel's misconduct occurred in a case already marred by the permeating incompetence of defense counsel and misconduct of the prosecutor. One instance of the prosecutor's conduct was found by the Nebraska Supreme Court to be "improper" and "error" but not sufficient grounds for reversal. Grandsinger v. State, 161 Neb. 419, 448, 73 N. W. 2d 632, 651 (1954). Defense counsel had failed to request a change of venue despite evidence of strong feeling against the defendant because of his Indian extraction. He failed to object to the admission of the alleged confessions on the grounds that they violated federal due process. He failed to object to the admission of the so-called confession of April 11, 1954 on the ground that the only words contained in it relating to the crime for which petitioner was on trial were admittedly not petitioner's words. In his cross examination of the state's witnesses, defense counsel failed to bring

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out a crucial inconsistency in the prosecution's evidence whereby through the use of alleged confessions the prosecution sought to prove that the last of the shots fired was the fatal shot, whereas the testimony of state witnesses at the trial developed the theory that the first shot fired was the one which killed the patrolman. Nor were any of the foregoing points raised by defense counsel in the Supreme Court of Nebraska as long as original defense counsel was still in the case, although taken together they constitute the heart of the defenses available to petitioner in this case. Under these circumstances, the spectacle of the prosecutor and the court diverting the attention of the jury from the case of the accused to the irrelevant and highly prejudicial question of the guilt of his counsel shows a shocking disregard of petitioner's right to a fair trial, in violation of due process of law.

QUESTION 2

At his trial petitioner took the stand and asserted his innocence and has at all times thereafter asserted his innocence. The principal evidence against him were the confessions and statements taken from petitioner during the 55 hours following his arrest. Although petitioner testified that he was physically abused (R. E. 435, 441, 443) and threatened (R. E. 435, 436, 443), this was denied except for the county sheriff's admission that he turned petitioner's head around (R. E. 534, 580). The question in this Court is whether the uncontroverted testimony of the circumstances under which the confessions were obtained establishes that their admission in evidence was in violation of the due process clause of the Fourteenth Amendment. The following summary of the evidence is therefore based only on uncontroverted testimony.

Petitioner was arrested at 3:00 p. m. on Friday, April 9, 1954 (R. E. 565). At the time of his arrest he was physically and emotionally exhausted. He had not eaten for at least 24 hours, or since noon or soon thereafter on Thursday (R. E. 937, 478, 489 to 490), and had not slept for a longer period (R. E. 480). For 16 hours he had been trying to elude capture, and just before he was captured he was nearly drowned in the Niobrara River. He tried to swim the river, and in the words of the witness who effected his capture, the "strong currents" in the river "took him under" and he didn't reappear "for quite a while and I thought he was

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gone for good, and then it has a back current there and he reappeared." He was swept under water for 75 feet, and then clung to a log (B. E. 947). His condition immediately after he was taken from the water was described by a state officer as: "he was soaked with water, and his general appearance was well, pretty run down, and his hair was all bushy, and one pants leg was missing, and he was pretty wild looking." (B. E. 733). A posse member described his condition at that time as "very poor" (B. E. 943), and a reporter who saw him soon thereafter said "* * * he was dirty, and he looked like probably any man would that was being chased by a posse for 16 hours. * * * He looked bad, yes." (B. E. 579). For a photograph of petitioner in this condition, see E73.

Psychological pressure accompanying the arrest would further weaken the resistance of any man who was already in this run-down physical condition. A posse of 300 to 400 men had been combing the hills for him (B. E. 656). After petitioner had surrendered, but while he was still clinging to the log in the river, a member of the posse went out into the river to get him. This posse member testified that another member of the posse fired at petitioner and "probably would have shot me if somebody hadn't jammed or knocked his gun down, and he shot under both of us. * * * He was shooting right underneath the log where we were." (B. E. 940). As petitioner was taken from the river to a car there were crowds of armed men around him (B. E. 577, 981). They talked about shooting him and "some of them said we will give him what he gave the patrolman the night before." (B. E. 941). Those taking petitioner to the car had to warn other members of the posse "to handle their guns a little more careful." (B. E. 942).

Petitioner was taken immediately to Valentine and upon arrival at the courthouse was taken directly to the room where interrogation took place, without any opportunity for food, rest, or change of clothing (B. E. 384). There was a crowd of persons both inside and outside the courthouse (B. E. 537, and see E74, a photograph of petitioner being "hustled" into the courthouse through a crowd, and E73, a photograph of petitioner being brought upstairs in the courthouse through a throng of officers and onlookers). Thus even without petitioner's controverted allegation that the sheriff threatened him that "the crowd would take care of me" if he didn't

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confess (R. E. 1001), the undisputed circumstances would have put any reasonable man in fear of mob action. They lend weight to petitioner's assertion that he only signed the first confession because "I felt that if I didn't sign it that, well, my life wasn't worth living another minute afterwards * * *." (R. E. 440).

Thus the stage was set for the interrogation of a man exhausted from being hunted in rough country for 15 hours by a large posse aided by aircraft, without food or sleep for more than 24 hours, chilled and groggy from having nearly drowned, and frightened from having been fired at after he had surrendered, from threats of lynching, and from the crowds around him at his capture and at the courthouse.

The questioning started immediately after petitioner arrived at the courthouse (R. E. 385; 384), which was about 3:30 p. m. (R. E. 384). Sometime after 9 p. m. he signed the first purported confession (R. E. 646; 410 to 412). During this period of about six hours he was kept continuously under questioning or in the office where the statement was being transcribed (R. E. 371; 377; 634). He was not allowed to eat anything until he had signed the statement (R. E. 540), and was not allowed to change from his wet clothes with the missing pant leg until 9:30 p. m. (R. E. 553). This first "confession" did not satisfy the officers, and after a respite of about 30 minutes duration (R. E. 440), during which he was given food, questioning was resumed at 10 p. m. Friday (R. E. 387) and continued until 3 a. m. Saturday morning (R. E. 565). Thus except for the 30 minutes interval referred to, he was under continuous pressure to confess for 12 hours after his arrest (ibid.)

The investigation was resumed at 9 or 10 a. m. Saturday (R. E. 390). He was questioned at the scene of the crime for "4 or 5 hours" (R. E. 429), or at least until 2:30 (R. E. 429) or 3:00 p. m. (R. E. 567). That evening and into the early hours of Sunday he was interrogated "at great length" (R. E. 395). He was again interrogated Sunday morning (R. E. 393), and on Sunday "afternoon and evening" (R. E. 330) was turned over to South Dakota and federal officials for questioning about crimes allegedly committed the night before the homicide. These officers took another statement from petitioner between 6:00 and 10:00 p. m. Sunday evening (R. E. 331). Although there is little in the record as to what happened thereafter, evidently he was still being questioned on Monday, for on that day he

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was brought into the county attorney's office to identify allegedly stolen goods found in his car (R. E. 722).

Petitioner was 20 years of age at the time, had a ninth grade education (R. E. 475), and had little experience in dealing with law enforcement officers. At the first interrogation an officer was assisted by a pharmacist (R. E. 604; 606) who had no connection with the law enforcement agencies. The petitioner's size does not appear in the record, but he is described as "slightly built" (R. E. 603). Among those questioning him were men described as 6'4" tall and 212 lbs. (R. E. 569), 6'1" tall and 229 lbs. (R. E. 308 and 309), 6' tall and 175 lbs. (R. E. 308), another "fairly large man" (R. E. 603; 604) and a "big man" (R. E. 604). Petitioner is described as being smaller than the smallest of his interrogators, who was 5'7" tall and 160 lbs. (R. E. 604). An indication of the size of petitioner may be obtained by comparing his size with that of the officers surrounding him in photographs E53 and E73.

Although petitioner was arrested on Friday afternoon, he was not arraigned or given a preliminary hearing until some time Monday, April 12 (Tr. 8). A sheriff admitted that petitioner was held incommunicado and that no one was permitted to see him until " a couple of days" after the preliminary hearing (R. E. 550), and until this time he had no lawyer and his relatives were not permitted to see him (R. E. 452).

Petitioner was arrested without a warrant; the warrant which appears in the transcript is dated three days after he had been taken into custody (Tr. 6). In Nebraska detention following arrest without a warrant is legal only until a legal warrant can be obtained. Neb. Rev. Stats. § 29-401 (Reissue 1948), which in this case could have been done immediately. Once this warrant is issued, the defendant must be brought before a magistrate "forthwith," Neb. Rev. Stats. § 29-406, (Reissue 1948). During the detention in this case, from 5 p. m. Friday until some time Monday, petitioner was continuously confined in the courthouse at Valentine, and the arraignment and preliminary hearing could presumably have been held any time. In the absence of evidence demonstrating the necessity of such a delay, the delay here is unreasonable as a matter of law.

The judgment of the Supreme Court of Nebraska of June 30, 1956 sustaining

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the use of all these confessions obtained under the foregoing circumstances raises a serious question of due process which ought to be settled by this Court. Whether the actions of the law enforcement officers in detaining petitioner illegally for prolonged questioning are sufficiently serious to invalidate the use of the confessions under the due process clause may be open to dispute. Compare Ashcraft v. Tennessee, 322 U.S. 143 (1944) with Stein v. New York, 346 U.S. 156 (1953). In this case, however, there was a factor not present in the confession cases previously decided by this court. Petitioner's resistance was worn away by the cumulative effect of the actions of the officers and the circumstances preceding and surrounding his arrest. When petitioner was arrested, he was in no condition to be questioned, let alone being subject to a prolonged ordeal. The "circumstances surrounding the confession" which are to be reviewed, Leyra v. Denno, 347 U.S. 556, 558 (1954), must include the physical, emotional and mental condition of the defendant at the time of the arrest; this is essential in order to apply the test of Stein v. New York, supra at 158, that "the limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." It follows that where a defendant's "power of resistance" has already been virtually destroyed by physical exhaustion, near-drowning and threats of mob violence before and during arrest, relatively little pressure to confess after he is in custody may be sufficient to accomplish extortion of an involuntary confession. This question, however, has never been determined. It is squarely posed by this case and its resolution is important for the administration of justice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Eugene D. O'Sullivan Sr.
278 Aquila Court Building
Omaha 2, Nebraska

James A. Lake Sr.
4600 Bryan Circle
Lincoln 4, Nebraska

Counsel for Petitioner

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Of Counsel:

Arthur Lazarus, Jr.
Richard Schifter,
Association on American Indian
Affairs
1700 K Street, N. W.
Washington 6, D. C.

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APPENDIX A

General Number 33663

IN THE SUPREME COURT OF NEBRASKA

Loyd Carroll Grandsinger,

Plaintiff in Error,

v.

STATE OF NEBRASKA,

Defendant in Error.

Error from the District Court of
Cherry County, Nebraska.
Hon. E. L. Meyer, District Judge

MOTION FOR LEAVE OF COURT TO FILE AMENDED AND SUPPLEMENTAL MOTION AND BRIEF FOR REHEARING AND TENDER OF COPY OF SAID PROFFERED FILINGS.

Eugene D. O'Sullivan, Sr.
Omaha, Nebraska
Attorney for Plaintiff in Error

- -

Comes now the Plaintiff in Error, Loyd Carroll Grandsinger, acting by and through his attorney, Eugene D. O'Sullivan, Sr., and moves the Court for an order granting him, the said Loyd Carroll Grandsinger, leave of Court to file an Amended and Supplemental Motion for a Rehearing in this case and a Brief in support thereof and states to the Court that 16 printed copies of same have been deposited in the office of the Clerk of this Court and which copies are herewith tendered for filing in the event that said leave of Court is granted.

1. That said plaintiff in error alleges that the questions to be presented herein could not have been raised in the Petition in Error or Motion for Rehearing heretofore filed in this case and passed upon adversely by the Court for the reason that they, and each of them relate to claimed misconduct and incompetence of Charles A. Fisher, then serving as chief defense counsel for plaintiff in error, and this Motion is the first opportunity accorded to plaintiff in error to present these questions to this Court by an attorney who was not culpable.

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2. That the orderly administration of justice will be promoted and attained if the following constitutional questions presented herewith, and each of them, are considered by the Court and decided upon their merits at this time by this Court, and the necessity of future, prolonged collateral proceedings, in the State and Federal Courts could be curtailed or avoided.

3. That said Plaintiff in Error further states to the Court that Charles A. Fisher, the former Chief Defense Attorney for said plaintiff in Error in this case, because of reasons personal to himself growing out of his own misconduct and incompetence during the trial of the case in the District Court and the Supreme Court, failed, neglected and refused to raise the following questions, and each of them, in the District Court and in the Supreme Court of Nebraska, or in any other legal proceedings had in said case, all of which matters now sought to be raised affect materially the substantial rights of said plaintiff in error:

(a) That the confessed criminal misconduct of chief defense counsel, Charles A. Fisher, who was caught in the act of tampering with the evidence offered in the case and was forced to confess his guilt in open court in the presence of the jury, by admitting his own misconduct, where the trial jury could not have any further trust or confidence in him and created situations in which the interests of defense counsel, thereafter, in endeavoring to protect his own professional future were adverse to the duties which an attorney owes his client and such besmirchment of said attorney and his self-created conflict of interest was and is a deprivation of the effective and unqualified representation by counsel required in state capital cases by the appropriate parts of Section 1 of the Fourteenth Amendment to the United States Constitution.

(b) That a defendant is denied a fair trial, where the record shows that defense counsel was incompetent and engaged in criminal misconduct during the trial of the case by mutilating an exhibit in the case, and where the special prosecutor and the court forced defense counsel in open court to confess his offense and admit his wrongful activity in front of the jury, and the Court failed to give the jury any cautionary instruction at any time concerning this matter.

(c) That the admission of confessions obtained from a defendant who as a result of lack of food and sleep was physically and emotionally exhausted at the

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time of his arrest, who was frightened at the threat of mob violence, who was not given a preliminary hearing promptly after his arrest, and who was allowed neither rest nor food nor permitted to converse with his friends or secure counsel until he had signed a confession violated Section 1 of the due process of law clause of the Fourteenth Amendment to the United States Constitution.

4. That in order to avoid needless repetition, quotations from the record in this case on file in this Court and other essential and necessary data from the record as well, as the citation of supporting authorities which sustain the foregoing reasons are not set forth herein but for the purpose of advising the Court are incorporated by reference herein from the supporting brief tendered for filing as fully and completely as if set forth herein.

WHEREFORE, for each and all of the foregoing reasons the plaintiff in error respectfully prays for an order of Court granting him leave of Court to file his tendered Amended and Supplemental Motion and Brief for Rehearing in this case, and for such other and further relief as justice and equity may require.

LOYD CARROLL GRANDSINGER,
Plaintiff in Error,

BY: _____
HIS ATTORNEY

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receiver's bond is likewise overruled.

MOTIONS OVERRULED.

LOYD CARROLL GRANDSINGER, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.
— N. W. 2d —

Filed December 16, 1955. No. 33663.

1. **Criminal Law: Appeal and Error.** In criminal prosecutions it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, all of which are matters for the jury.
2. ———: ———. In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it

is so lacking in probative force that we can say, as a matter of law, that is is insufficient to support a finding of guilt beyond a reasonable doubt.

3. Criminal Law: Evidence. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.

4. ———: ———. However, there are exceptions to such rule where a defendant is charged with a crime involving the essential elements of motive, intent, or guilty knowledge, and such evidence is admissible in such cases if it falls within one or more of such recognized exceptions.

5. Trial. A statute requiring that instructions be in writing is not to be so construed as to require the court to reduce to writing all the admonitions which it may be proper to give the jury while the trial is in progress.

6. ———. Subject to general rules, the trial court may orally give its opinion on a motion to exclude testimony; in ruling on the admissibility of evidence, may explain its rulings; and state for what purpose evidence is admitted, limit its application, or direct the jury to disregard it.

7. Criminal Law: Evidence. When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any other matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.

8. ———: ———. The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error.

9. Criminal Law: Trial. A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.

10. ———: ———. All instructions given should be considered in determining whether a particular instruction is prejudicial, and where instructions considered as a whole state the law fully and correctly, error may not be predicated thereon merely because a separate instruction, considered by itself, might be subject to criticism or is incomplete.

11. ———: ———. It is not error to refuse instructions requested by defendant where the court on its own motion has given the

substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law.

12. **Homicide.** Section 28-401, R. R. S. 1943, does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right of a jury in its discretion to determine in a homicide case whether upon finding an accused guilty of murder in the first degree the penalty shall be death or imprisonment for life. The statute commits the whole matter to the judgment or conscience of the jury and the doctrine of reasonable doubt has no application in the jury's determination of the penalty to be imposed.

13. **Criminal Law: Trial.** The mere fact that a witness in a criminal prosecution is a regular law enforcement officer does not entitle an accused to an instruction that the jury in weighing his testimony should exercise greater care than in weighing the testimony of other witnesses.

14. ———: ———. The rule that where informers, detectives, or other persons employed to produce evidence against the accused are called to testify against him, the defendant is entitled to an instruction to the jury that in weighing the testimony of such witnesses greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested, is generally not applicable to public law enforcement officers who are witnesses.

15. **Homicide: Trial.** In a homicide prosecution it is not proper to give an instruction as to assault in any of its grades unless such instruction is applicable and authorized by the evidence.

16. ———: ———. Pardon or parole relates to something that may happen after conviction by action of the executive department. The jury in a homicide case has nothing to do upon a finding of guilt of murder in the first degree except to determine whether the penalty should be death or imprisonment for life, and in event the decision is for life imprisonment, whether or not a defendant should be later pardoned or paroled is not a matter of concern for the jury. Its task is to choose between one or the other of the penalties and its decision should not rest upon whether pardon or parole is easy or difficult to secure.

17. ———: ———. In a homicide case, a prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree, and the scope of his argument in that regard should be given a broad latitude provided it is predicated upon the evidence or reasonable inferences therefrom.

18. ———: ———. However, it is improper and error in such cases for the prosecutor to make any statements in his closing argument with regard to pardon or parole, although it is not prejudicial error to make remarks which are simply a statement of existing constitutional or statutory law, which all men, including the jurors, are presumed to know and doubtless do already know before the statement is made, if the statement is unaccompanied by other related objectionable or prejudicial remarks.

ERROR to the district court for Cherry County: EARL L. MEYER, JUDGE. *Affirmed.*

Charles A. Fisher, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer*, for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff in error, Loyd Carroll Grandsinger, hereinafter called defendant, was charged with murder in the first degree by shooting and killing one Marvin Hansen, a Nebraska safety patrolman, on April 8, 1954, in Cherry County, Nebraska. Defendant pleaded not guilty, and after trial to a jury in the district court it returned a verdict which found defendant guilty of murder in the first degree and fixed the penalty at death. Defendant's motion for new trial was overruled, whereupon judgment and sentence in conformity with the verdict were rendered. Therefrom defendant prosecuted error to this court. Errors assigned and discussed are substantially as follows: (1) That the evidence was insufficient to support the verdict and judgment or justify the death penalty; (2) that the trial court erred in the admission of certain evidence; (3) that the prosecutor in argument was guilty of misconduct prejudicial to defendant's rights; (4) that the trial court erred in giving and refusing certain instructions; and (5) that in the event of affirmance, the verdict and judgment

should be modified to reduce the sentence under the provisions of section 29-2308, R. R. S. 1943. We conclude that the assignments should not be sustained.

There is competent evidence in the voluminous record from which the jury could have concluded beyond a reasonable doubt as follows: At the time of the alleged commission of the crime in Cherry County, Nebraska, about 11:30 p. m., April 8, 1954, defendant was 21 years of age, with the equivalent of a tenth-grade education. He was born at Valentine, Nebraska, but had been living at Bell Gardens, California, a suburb of Los Angeles, where he had been employed as a receiving clerk. He was married and had one child about 14 months old at time of trial. However, about a month previous to April 3, 1954, he had separated from his family because of marital difficulties. On April 3, 1954, out of employment and with little cash, defendant left California in his own 1941 Ford car and started east. Defendant's brother, Leon, 32 years old, left with him. Prior to leaving, defendant took a gun, a .22 cylinder pistol, from a trailer house belonging to a friend. Defendant's car was not in good condition, and at various points along the route they worked on it. Also along the route they prowled and pilfered several cars from which articles were stolen. Eventually defendant's car would barely run, so at some point in Wyoming they stole a 1952 or 1953 Ford car, behind which they towed defendant's car the rest of the way while one of them guided it, because to leave it would be a dead give-away. They started the stolen car by direct wire from battery to coil. In that regard, defendant said, "there wasn't a car he couldn't get into in two minutes." A second .22 cylinder gun, almost identical with that taken by defendant, was also stolen by them either from one of the prowled cars or from the stolen car, so that each one of them had a loaded gun, which carried nine .22 long rifle cartridges, in his possession, with extra such cart-

ridges to use in them, and they engaged in target practice.

After stealing the car and numerous other items including the guns, they drove on to Valentine, Nebraska, thence to a point south and east of Springview where they stopped at a hay lot and worked on defendant's car. From there they drove to a point southeast of Wewela, South Dakota, and parked defendant's car about 100 yards off the highway along a creek. Thence they drove to a farm where defendant stole a tire and they stole 25 or 30 gallons of gasoline, some of which they took along with them in cans taken by defendant from a pick-up truck.

On Wednesday evening, April 7, 1954, about 8:30 p. m., they arrived at the home of an acquaintance, Bud Frederickson, located a few miles east of the Cherry County line. Both Bud Frederickson and his brother Fred were there at the time. Bud testified as a witness for the State. Defendant and Leon while there together both visited with the Fredericksons quite a while, as much as 2½ or 3 hours. Among other things, they bragged of their prowess, and Leon asked the Fredericksons if they wanted a pheasant which defendant had shot from the car window with one of the .22 pistols as they were driving along the highway in South Dakota. Leon told the Fredericksons, "Don't tell anyone that we are even in the country" because "I am wanted for parole violation that I jumped, and some bad checks that I gave." He then took one of the .22 cylinder pistols out of the stolen car, showed it to them, warned that it was loaded, refused to sell it, and put it back in the car. Also, defendant and Leon attempted to sell the Fredericksons some second-hand clothing, tires, and tools which they had in the stolen car. When asked where they got the tools, defendant answered, "That is a racket man, it is easy to get tools." When asked where they got all those clothes, Leon said, "it was a racket

it was easy to get clothes." As a matter of fact, they were admittedly stolen along the way.

Defendant and Leon then told of having another car. They wanted to change motors because the car they were then driving was stolen by them, as they then said, east of Las Vegas, Nevada, where defendant's car broke down. They stated that they intended to change motors, pour gasoline over the body of the stolen car, and burn it in order to destroy the evidence, then taken defendant's car to Council Bluffs, Iowa, have the motor numbers ground off, and get a title thereto so they could sell it. They asked permission to use Fredericksons' barn or to go out in their canyons and so change motors and burn the evidence, but that was refused. They then talked about going up to Henry Johnson's place in Wewela, South Dakota, where they once lived, and use the barn and cellar there to change motors. When asked what if Johnson "walks up on you" they replied, "We will be able to talk him out of it and if he doesn't and can't talk he won't get away until we are done with him." However, the Fredericksons finally convinced defendant and Leon that they should take the cars out in the sand hills where they could more safely change the motors and burn the body of the stolen car. It then was arranged that defendant and Leon should come back the next night at 10 p. m., bring defendant's car along, and the Fredericksons would show them the way west as far as the game refuge, from which point they would be on their own. When Bud Frederickson asked what they would do if some one came riding up on horseback out there in the sand hills, defendant said, "we will watch that, we will be down there in the brush." When asked, "Well, what will you do, you got a gun" defendant said, "we will bluff them out and if we can't bluff them out we won't let them get away."

When defendant and Leon left the Fredericksons' place, they drove to Wewela, South Dakota, where defendant broke a window in the door, and opening it, they

burglarized a store and the United States post office, stealing therefrom food, clothing, tools, other merchandise, and cash. They then drove back to Bud Frederickson's place, arriving there about 5:30 a. m., Thursday, April 8, 1954. The back of the stolen car "was clear full of something" and Leon asked Bud if they could unload some groceries admittedly obtained by robbing the store at Wewela. Bud refused to let them unload the merchandise but told them there was a place down by the river where they could hide the stuff and they could pick it up that evening when they returned. They ate part of the food, then hid the stolen merchandise in a ravine some distance back of a schoolhouse located on the river road. However, two cigar boxes, containing the money admittedly taken from the store and post office at Wewela, were kept in their car. They then went to the home of a person for whom defendant had worked in 1951, where they had breakfast and dinner, visited, and slept before leaving in late afternoon. From there they drove by a roundabout way to the place where defendant's 1941 car had been left, and, hitching it behind the stolen Ford, drove back to Fredericksons, arriving at about 10:10 p. m., as previously arranged.

In the meantime, after defendant and Leon had left Fredericksons' place on the morning of April 8, 1954, the Fredericksons had gone to Valentine and reported to the Cherry County sheriff and state safety patrolman Marvin Hansen the information which they had obtained with regard to the unlawful conduct of defendant and Leon. Pursuant to prior arrangements, defendant and Leon, having arrived at Fredericksons' place that evening, the Fredericksons directed them along a road which took them to a place near Berry hill on highway No. 7, where the fatal shooting of the patrolman took place. As previously arranged, the Fredericksons were presumably showing defendant and Leon a way to the sand hills where they could remove the motor from the stolen car, burn the body, and place the motor therefrom in defend-

ant's car. The Fredericksons led the way in a car owned by Fred from which the bulb in the left taillight had been removed in conformity with instructions given by the sheriff and patrolman. Their car was followed by Leon driving the stolen car with lights on, and towing defendant's car which defendant was guiding without lights.

That evening about 9 p. m. the sheriff and patrolman, the mayor of Valentine, the chief of police, and a police officer from Valentine, all drove to the vicinity of Berry hill. The sheriff and patrolman went in the sheriff's car, driven by him. That car was equipped with two headlights, also two red lights on the front of the car which blinked on and off, a siren, a two-way radio, and a portable spotlight which was powered by plugging the end of its 7-foot cord into the lighter socket. A road block was set up at Berry bridge where the mayor and two police officers remained. The sheriff and patrolman then drove north on the highway in the sheriff's car for about one-eighth of a mile, where they turned around facing south, and waited for some period of time before they saw the headlights of two cars coming from the east. Such cars turned south on highway No. 7 and the officers noted that the left taillight of the first car was out and that two cars were following with he[illegible]hts only on the first car. When such cars had pass[illegible]e sheriff communicated by two-way radio with the officers at Berry bridge, then started his car, and with lights off drove out on the highway. After driving out upon the highway, the sheriff turned on his lights, including the blinking red lights, and started the siren on his car. He so stayed behind the stolen car driven by Leon and defendant's towed car guided by defendant until they slowed down and stopped on the right or west side of the highway headed south. There the sheriff stopped his car on the left or east side of the highway after turning it a little toward the west so that his lights would shine on both the other two stopped cars. The Fredericksons

drove on down the highway and home. At the time such cars stopped, the patrolman had the portable spotlight on and was holding it in his hand as he sat on the right side of the sheriff's car. There are exhibits in the record showing the position of the three cars after they stopped. As a matter of fact, photographs received in evidence show the location of the cars and the position of the sheriff, patrolman, and defendant as they alighted therefrom. Such locations and positions were fixed by defendant himself on April 10, 1954, when he voluntarily made a statement to officers at the scene of the tragedy.

As the cars stopped, Leon was seen sitting in the driver's seat of the stolen car with his left hand on the steering wheel and one of the stolen .22 pistols in his right hand. Defendant was seen sitting in the driver's seat of his towed car. Thereupon, the sheriff jumped out on the left side of his car and the patrolman jumped out on the right side thereof. Each of them held a .38 revolver, identical except for serial numbers. The patrolman was dressed in a well-marked regulation uniform with cap, Sam Browne belt, and official badge. Both defendant and Leon well knew that the sheriff and patrolman were officers. Leon opened the left door and swung his feet out, gun in hand, but obeyed the sheriff's orders to drop the gun and come out with hands up, whereupon the sheriff handcuffed him and chained him to defendant's car. The .22 pistol, loaded with long rifle cartridges which had been in Leon's hand, was thrown back on the seat of the stolen car and taken care of by the sheriff or other officers. It was never fired that night, and the only other .22 pistol at the scene was the one in defendant's possession.

As the patrolman jumped out on the right side of the sheriff's car, defendant reached for and obtained the other .22 pistol hidden in his car, and instead of coming out the left door with his hands up as commanded, defendant opened and came out of the right door, thus

placing himself between his car and the patrolman. Defendant had his gun, loaded with .22 long rifle cartridges, in his right hand, concealed down by his side. As the patrolman walked out into the highway telling defendant to follow him on back, defendant came around the corner of his car where he could see the patrolman, then started running toward the west. Twice the patrolman told defendant to "stop" but he paid no heed, and running, fell into a west roadside ditch. The patrolman then twice told defendant to "get up" but there was a pause and defendant shot the patrolman and ran on west, followed by the patrolman for some 200 feet from the sheriff's car, where the patrolman was later found lying on the ground face down, unconscious, gravely and mortally wounded by a .22 bullet. The patrolman's gun was found lying just to the left of his body, with all cartridges therein discharged except one. Defendant escaped and contended in his testimony that as he came around his car, the patrolman fired into the ground and defendant ran away because he was frightened. He claimed that if he shot the patrolman, which he denied, that his .22 pistol was discharged accidentally when he fell; or, that things blacked out, and, because of his mentally insane condition and the strain, he didn't know what he was doing; or that in any event he didn't know the patrolman was an officer, and shot in self-defense. However, there was ample competent evidence that defendant knew the sheriff and patrolman were officers; that defendant's .22 pistol was fired first; and that after a pause there were .38 and other .22 shots fired which gradually got farther away from the cars toward the west after each shot. In any event, all of defendant's defenses aforesaid were submitted to the jury in a manner entirely proper and favorable to defendant.

As defendant and the patrolman ran west, the sheriff called over his two-way radio to the officers at Berry bridge, asking for immediate help. When they came

down to the cars, a police officer was left in charge of Leon while the sheriff and other officers went to look for defendant and found the patrolman. Even after finding the patrolman the officers heard two .22 shots fired from the west and north. It will be noted that at all times all persons at the scene were east thereof except defendant, and no other .22 except defendant's was fired that night.

The officers, upon locating the patrolman, examined his body and found a bullet hole in the area where it had passed through his pants belt and entered his body. He was thereupon placed on a stretcher and the sheriff took him to a hospital in Valentine, where a physician previously called examined the patrolman and found that he was dead. His examination disclosed a small penetrating wound in the area where a bullet had passed through the patrolman's Sam Browne belt, pants belt, and trousers, then entered his body to the left and above the left-hand side pocket, and then came out of his body, naturally forming a larger hole on the right side below the outer edge of his right hip pocket. A post-mortem examination disclosed that the bullet had passed into the patrolman's body at an upward angle, then perforated his aorta, a main artery which travels from the heart down through the chest and abdominal cavity. The bullet also pierced a kidney and upon being deflected downward by his ribs, came out of his body. After diligent search the bullet was never found. From such examination the physician concluded that the wound was caused by a bullet, and that death was caused by progressive loss of spurting blood from the aorta into the peritoneal cavity. The physician gave his opinion that it was a wound which could have been produced by a .22 bullet, certainly not by a .38 or larger bullet. He found that the perforation in the aorta was only pencil-tip size, and could not have been caused by a .38. He also testified that the impact of such a wound from a .22-caliber gun would not have caused

great pain, discomfort, or immediate collapse as a larger bullet would have done, and would not have prevented a man the size of the patrolman from running a distance of 200 to 250 feet immediately after receiving the wound before he would fall. Further, it was established by the undisputed testimony of gun experts that the holes in the patrolman's Sam Browne belt and pants belt were caused by a .22 bullet and could not have been caused by a larger one. Further, such belts were received in evidence and an examination thereof by the jury would make such conclusion self-evident.

After the patrolman had been removed from the scene of the shooting, the chief of police brought Leon to the police station at Valentine. Also, the mayor drove the stolen Ford while a police officer guided defendant's towed car into Valentine where they were stopped behind the courthouse. There a written inventory was taken of numerous articles found in the cars. It included a skeleton key, numerous tools both in a box and outside thereof, clothing for both men and women, 3 flashlights, 3 trouble spotlights, a gun holster, 15 packages of cigarettes, a brief case, an electric iron, a glass fish pole, 2 boxes of Christmas tree lights, a camera, a 1953 California car license plate, a suitcase, and other items including 1 full box and a few extra .22 long rifle cartridges found in defendant's car and three-fourths of a box of such cartridges found in the stolen car. Further, two cigar boxes containing money identified by defendant as having been admittedly taken by defendant and Leon from the burglarized store and post office at Wewela, South Dakota, were also previously found in such cars. Certain other items aforesaid were identified by defendant as having been stolen from other cars while they were traveling east from California.

Defendant having escaped, a posse was organized at the courthouse in Valentine, and he was apprehended about 8 a. m., April 9, 1954. He was first sighted by members of the posse about 80 rods from the home of

his former employer where defendant and Leon had visited, eaten, and slept the day before. When defendant saw the armed posse he jumped into the river and started to swim across, but the current was too swift and he was persuaded by his former employer to surrender. When certain patrolmen arrived upon the scene, defendant was searched, handcuffed, placed in a patrolman's car and taken to the jail at Valentine. When searched, nine .22 long rifle cartridges which would fit defendant's gun were found in defendant's pockets. The .22 pistol which he had when he left the scene of the shooting was never found. It was admittedly thrown away or lost by defendant in his flight.

During the afternoon of April 9, 1954, defendant voluntarily made and read a written confession which, by interlineation, was corrected in certain particulars by defendant in his own handwriting and signed by him on each page thereof in the presence of three witnesses who signed as such. Again, on April 10, 1954, defendant voluntarily gave another transcribed similar statement at the scene of the crime during which he placed the cars, himself, the sheriff, and the patrolman in the positions where they were located at the time of the shooting, and demonstrated what happened there. Again, on the afternoon of April 11, 1954, defendant voluntarily made and read another written confession which also, by interlineation, was corrected in certain particulars by defendant in his own handwriting, and was signed by him on each page thereof in the presence of two witnesses who signed as such. Further, such confession was subscribed and sworn to before a post-office inspector who as such acknowledged same.

Defendant in his testimony claimed that the confessions aforesaid were not voluntarily given, and equivocally denied that he had made several statements contained therein. However, those were matters for determination by the jury under appropriate instructions given by the trial court.

The record discloses beyond dispute that between April 3, 1954, and April 8, 1954, defendant and Leon committed the crimes heretofore recited and were fugitives from justice of at least Wyoming and South Dakota and perhaps other states as well between California and Nebraska; and that they were guilty of at least two federal offenses of stealing and transporting a car across state lines and burglarizing the post office at Wewela, South Dakota. At the time of the alleged offense defendant and Leon were on their way to a hide-out in the sand hills to remove the motor from the stolen car, place it in defendant's car, and then burn the remains of the stolen car in order to destroy the evidence. Their cars were then loaded with stolen merchandise, and each of them then had a stolen .22 pistol loaded with .22 long rifle cartridges in his possession. The evidence fully justifies the conclusion that they were aware of the serious consequences of arrest and had armed themselves in order to kill any person who attempted to stop them, and that defendant shot and killed the patrolman in order to escape. In other words, when the patrolman attempted to arrest him, defendant purposely and deliberately carried out his premeditated plan and shot and killed the patrolman. In the light of the foregoing, we conclude that the evidence was amply sufficient to support and sustain the verdict, judgment, and sentence.

In that respect, the applicable and controlling rules are: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"In a crimin[illegible]ase, this court will not interfere with a verdict of gu[illegible] based upon the evidence, unless it is so lacking in [illegible]ative force that we can say, as a matter of law, th[illegible] is insufficient to support a finding of guilt beyond a reasonable doubt." Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

Defendant argued that the trial court erred in admittting part of a conversation which defendant had with a sheriff from South Dakota who was a friend of defendant and present when defendant made a confession on April 11, 1954. The conversation is too long to set forth here. It is sufficient for us to say that the trial court admitted it solely for the limited purpose of helping the jury decide whether or not such confession was voluntary, and the jury was so cautioned by the court. Defendant, in his objections to the conversation said that, "even though it might tend to" so assist the jury, such conversation was inadmissible because it related in part to another crime previously committed by defendant. In that regard, defendant testified at length about such conversation, and, even assuming that a part thereof offered by the State was erroneously admitted, it could not have been prejudicial to defendant's rights. We find no prejudicial error in admission of the evidence under the circumstances.

Defendant also objected to the admission of other evidence adduced by the State which related to commission of the other crimes for which defendant had never been apprehended or tried, and which were allegedly committed by defendant between April 3, 1954 and April 8, 1954, the date upon which the patrolman was killed. We have heretofore discussed the evidence with relation thereto, and it will not be repeated. For like reasons, defendant also objected to the opening statement of the prosecutor with regard to what the State expected to prove with relation thereto and contended that such was misconduct requiring reversal. The trial court overruled defendant's objections and motions for mistrial upon the ground that the evidence was admissible solely and only for the limited purpose of determining whether or not defendant had a motive or intent to shoot the patrolman. Upon the admission of such evidence the trial court upon several occasions so orally admonished the jury, and again in the instructions it was made

crystal clear that defendant could not be convicted of the crime charged by proof of the commission of some other crimes or wrongs, but that such evidence, if believed, should be considered by the jury solely for the purpose of determining defendant's alleged motive, intent, malice, deliberation, and premeditation. We decide that under the circumstances such evidence was admissible for such limited purpose, and as a matter of course it follows that the prosecutor was not guilty of misconduct in making his related opening statement.

In that connection, Fricke v. State, 112 Neb. 767, 201 N. W. 667, held: "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution." However, there are exceptions to such rule. In Swogger v. State, 116 Neb. 563, 218 N. W. 416, this court held: "Except as to crime having an element of motive, criminal intent, or guilty knowledge, evidence of separate and distinct offenses committed by accused is not admissible. If such evidence is admitted, and is prejudicial, a conviction cannot stand." In the opinion it is said: "Only in crimes involving motive, intent, or guilty knowledge may evidence of independent crimes, wholly disconnected with the one charged, be received."

In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, this court held: " 'It is a general rule that, on the trial of one accused of crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions.' Abbott v. State, 113 Neb. 524, 206 N. W. 153." See, also, Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113.

In the case at bar, defendant was charged with murder in the first degree, that is, that he purposely and of deliberate and premeditated malice shot and killed the patrolman. The defenses claimed by defendant have been

heretofore recited. It therefore appears that defendant's motive, criminal intent, and guilty knowledge were important elements from the inception of the trial. Thus, it was important and proper for the State to adduce evidence that defendant had committed such other crimes for which he had never yet been apprehended or tried on account of which he was a fugitive from justice, for the purpose of tending to prove that defendant feared arrest, and therefore had a motive for and did intentionally shoot and kill the patrolman in order to effect an escape. Voluminous competent evidence supports that theory.

There are numerous authorities involving comparable situations wherein law enforcement officers were killed which support the foregoing conclusions. In that regard, see, Shelton v. State, 106 Ohio St. 243, 140 N. E. 153; People v. Middleton, 65 Cal. App. 175, 223 P. 448; Sullivan v. State, 163 Ark. 11, 258 S. W. 643; Lawrence v. State, 29 Ariz. 247, 240 P. 863, certiorari denied 269 U. S. 585, 46 S. Ct. 201, 70 L. Ed. 425; Harden v. State, 211 Ala. 656, 101 So. 442; People v. King, 276 Ill. 138, 114 N. E. 601; State v. Calloway, 174 La. 134, 140 So. 2; Eagles v. United States, 25 F. 2d 546; People v. Slater, 199 Cal. 357, 249 P. 177. For discussion of comparable propositions of law under distinguishable facts and circumstances, see, Haunstine v. State, 31 Neb. 112, 47 N. W. 698; Clark v. State, 79 Neb. 473, 113 N. W. 211; and Jurgensen v. State, 135 Neb. 537, 283 N. W. 228.

Also, contrary to defendant's contention, the situation here was not an attempt to prove the bad character of defendant prior to his putting that question in issue. The evidence was received solely and only for the limited purpose heretofore set forth, and the jury was so instructed. Further, it was not admitted for any purpose of impeaching defendant's testimony by showing previous felony convictions. Therefore, contrary to defendant's contention, section 25-1214, R. R. S. 1943, had no application.

Defendant argued that the trial court erred in admitting evidence that shortly before the alleged killing defendant admittedly shot a pheasant with a .22 pistol here involved from one of the cars while it was in motion traveling along the highway in South Dakota. Such evidence was admitted for the sole and limited purpose of showing that defendant had such a pistol at that time and his ability to use it. The trial court so affirmatively instructed the jury and defendant's contention has no merit.

Defendant's wife was called as a witness in his behalf. She testified that prior to the time defendant left California they had been separated for about a month, but that on April 2, 1954, she had seen defendant and a reconciliation looked favorable. She also testified that on New Year's Eve, 1953, defendant had received a severe beating by some young men in Omaha, as a result of which defendant had since had lapses of memory and black-outs, which were reasons, among others, for their marital difficulties. Defendant himself also testified with relation to such beating, which allegedly affected his physical and mental condition, causing him to have mental lapses and black-outs which played quite a part in their marital troubles, but that he had talked to his wife about seeing a doctor and promised to do what he could to improve his mental condition. He also testified that on the night of the shooting things blacked out because of his mental condition, and he could not remember what happened part of the time. Thereafter defendant was asked on cross-examination: "Now, as a matter of fact you were going to divorce your wife to marry a women down here in Omaha, weren't you?" Without objection defendant was permitted to answer, "No, sir." For the purpose of impeaching such testimony of defendant and of his wife aforesaid, and also for the limited purpose of assisting in a determination of defendant's mental condition, the State, over defendant's objections, produced three letters admittedly writ-

ten by defendant to a named woman in Omaha. Upon proper foundation laid, they were received in evidence over defendant's objections. They appear as exhibits Nos. 67, 68, and 70. The prosecutor then said, "May it please the court, I need to read these exhibits to the jury for the limited purpose for which they are received." Whereupon counsel for defendant said, "Before he reads them to the jury will the court tell the jury that they are for the limited purpose for which they are received." Thereupon the court said: "Yes. Gentlemen as I said before a person can never be proved guilty of one charge by proving some other wrong. Sometimes evidence of other matters are received for a limited purpose. The State has offered this evidence and it is received for the limited purpose of going to show the defendant's mental condition—the question of his blackouts and his mental condition and possible motive, if it does have any bearing on it. You can consider it for no other purpose and if it doesn't throw any other light on those questions you should ignore the evidence entirely, and you are not only directed to but you are instructed to and will be instructed on that and I caution you to observe that instruction." Previously also, during foundational questions upon like request by counsel for defendant, the trial court had made an almost identical statement to the jury. Defendant is in no position now to argue that the court by so doing erroneously gave oral instructions to the jury in violation of sections 25-1111 and 25-1115, R. R. S. 1943. Further, instruction No. 16 given by the trial court instructed the jury with regard to the limited purpose of such evidence by use of language comparable to such oral admonitions. In that connection also, defendant argued that in several other respects too voluminous to repeat here, the trial court erroneously gave oral instructions. That contention has no merit. As stated in 64 C. J., Trial, § 582, p. 643: "A statute requiring that instructions be in writing is not to be construed as to require the court to reduce to writing all

the admonitions which it may be proper to give the jury while the trial is in progress." As stated in § 584, p. 644: "Subject to the general rules, it has been held that the court may orally give its opinion on a motion to exclude testimony; in ruling on the admissibility of evidence, explain the rulings; state for what purpose evidence is admitted; limit its application; or direct the jury to disregard it; * * *." See, also, 88 C. J. S., Trial, § 330, p. 867; Lee v. State, 147 Neb. 333, 23 N. W. 2d 316; Rakes v. State, 158 Neb. 55, 62 N. W. 2d 273. Such rules are applicable and controlling here.

Exhibit No. 67, dated March 22, 1954, and exhibit No. 68, dated April 1, 1954, were two letters contained in the same envelope, exhibit No. 69. They were written in Los Angeles but mailed to the woman in Omaha on April 2, 1954, from Bell, California. Insofar as important here, defendant stated therein that his wife was not going to sue him for divorce, so, having sufficient legal grounds, since his wife was to blame, he was going to divorce her. He urged the woman to come to California and get a job so they could be together, have some fun on the beach and in the sun, and to find out whether or not they wanted to marry after his divorce. Defendant warned her not to call his wife or let her know about their plans. Contrary to defendant's contention, we find nothing in such letters saying or inferring that they had been having any immoral relationship or that defendant's marital difficulties were caused by his mental condition.

Exhibit No. 70, addressed to the woman in Omaha, was actually written by defendant on April 8, 1954, the date of the alleged crime, while he was at his former employer's home. It was admittedly dated March 7, 1954, by mistake, and was never mailed but was found in defendant's pocket after the alleged shooting. Referring therein to California, he told the woman that he got away from out there and to stay where she was until he got back there in 3, 4, or 5 days, "because I got to

put a new eingine (engine) in my car but will see you soon left there last Sat. morning but have run into lots of trouble this trip."

In Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151, this court said: "The rule is that one charged with a crime, who becomes a witness in his own behalf upon his trial, is subject to the same rules that govern other witnesses upon cross-examination and may, on cross-examination, be interrogated as to matters brought out on direct examination. See, Crawford v. State, supra; 3 Wharton's Criminal Evidence (11th ed.), § 1303, p. 2174; 5 Jones, Evidence (4th ed.), § 821, p. 1519.

"In this respect we have said: 'Where a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, and may be required to testify on his crosss-examination as to any matters brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evdence may incriminate him.' Poston v. State, 83 Neb. 240, 119 N. W. 520.

"And in Peterson v. State, 63 Neb. 251, 88 N. W. 549, we said: 'The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown.' See, also, Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701."

In Washington v. State, 160 Neb. 385, 70 N. W. 2d 378, this court held: "The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error."

Such rules are applicable and controlling here. Contrary to defendant's contention, we conclude that the

trial court did not abuse its discretion and that the admission of the evidence aforesaid, under the circumstances presented in this case, was not prejudicially erroneous.

Defendant argued that instruction No. 9 given by the trial court was prejudicially erroneous. In that regard, instruction No. 4 given by the trial court among other things correctly defined the crime of manslaughter. Such crime was so redefined in instruction No. 9, after which it hypothetically required the State to prove certain specific enumerated elements by the evidence beyond a reasonable doubt before defendant could be found guilty of manslaughter. The instruction is verbose and to recite it here would serve no useful purpose. It is sufficient for us to say that the instruction was favorable to defendant. The applicable and controlling rule is that: "'A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.'" Luster v. State, 148 Neb. 743, 29 N. W. 2d 364. Defendant's contention should not be sustained.

Defendant argued that instruction No. 13 given by the trial court was prejudicially erroneous because it did not inform the jury that if there was a reasonable doubt as to whether or not defendant acted in self-defense, such doubt should be resolved in favor of defendant. In that regard, instructions Nos. 13 and 14. given by the trial court, both related to and submitted the matter of self-defense in sequence by the use of clear and unmistakable related language. The last paragraph of instruction No. 14 reads: "Regarding the offense with which the defendant is charged, it is necessary for the State to prove beyond a reasonable doubt that the defendant, Loyd Carroll Grandsinger, was not acting in self-defense and the burden is not on the defendant to prove he was acting in self-defense, and if the evidence in this case does not establish beyond a

reasonable doubt that the defendant was not act (acting) in self-defense, then you should find the defendant not guilty."

In Fullerton v. State, 148 Neb. 811, 29 N. W. 2d 618, we reaffirmed that: "All instructions given should be considered in determining whether a particular instruction is prejudicial." Also, in Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374, we reaffirmed that: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

"Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete." Such rules are applicable and controlling. Defendant's contention should not be sustained.

Defendant argued that the trial court erred prejudicially in refusing to give his requested instruction No. 1 which read: "If the jury believe beyond a reasonable doubt that defendant is guilty but have a reasonable doubt as to the degree of his offense they should give him the benefit of that doubt and convict him of the lower degree." The applicable and controlling general rule is that: "It is not error to refuse instructions requested by the defendant where the court on his own motion has given the substance of such requests." Leedom v. State, 81 Neb. 585, 116 N. W. 496. The substance of defendant's request appears in instructions Nos. 3, 7, 8, and 9. As recently as Washington v. State, *supra*, this court held: "A trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms it meets all the requirements of the law." Defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his requested instruction No. 2 which read:

"If the jury believe beyond a reasonable doubt that the defendant is guilty of first degree murder but have a reasonable doubt as to the punishment, they should give him the defendant the benefit of that doubt and fix the lessor (lesser) punishment of life imprisonment." In that connection, section 28-401, R. R. S. 1943, provides: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another * * * every person so offending shall be guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." Instructions Nos. 4, 6, and 7, given by the trial court, repeated that language and applied it. In Sundahl v. State, 154 Neb. 550, 48 N. W. 2d 689, we held: "Section 28-401, R. R. S. 1943, does not prescribe or authorize the court to prescribe any rule defining or circumscribing the exercise of the right to determine whether the penalty shall be death or imprisonment for life. The statute commits the whole matter to the judgment and conscience of the jury." Also, in 23 C. J. S., Criminal Law, § 1290, p. 868, it is said: "The doctrine of reasonable doubt has no application in the jury's determination as to the penalty to be imposed." See, also, 41 C. J. S., Homicide, § 399, p. 236, § 434, p. 319; People v. Krauser, 315 Ill. 485, 146 N. E. 593; Hart v. State, 220 Ind. 469, 44 N. E. 2d 346; Watts v. State, 229 Ind. 80, 95 N. E. 2d 570; State v. Tiedt, 360 Mo. 594, 229 S. W. 2d 582; People v. Martin, 12 Cal. 2d 466, 85 P. 2d 880; People v. Harris, 219 Cal. 727, 23 P. 2d 906; Hernandez v. State, 43 Ariz. 424, 32 P. 2d 18. Such authorities discuss at length the reasons for the foregoing rule. To set them forth here would serve no purpose. We conclude that defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his requested instructions Nos. 3, 4, 17, and 26, all of which related to the weight to be given the testimony of certain witnesses. Instruction No. 3

told the jury in effect that greater care should be exercised in weighing the testimony of police officers, detectives, criminal investigators, and safety patrolmen than in other cases because of their natural and unavoidable tendency and bias of mind to consider everything as evidence against accused and to disregard everything which does not tend to support their preconceived opinion of the guilt of accused. Instruction No. 4 was in substance identical, but simply used the all-inclusive term "law enforcement officers." Instruction No. 17 referred to witnesses employed by the State and told the jury that greater care should be exercised in weighing their testimony than in the case of a disinterested witness. Instruction No. 26 provided in substance that in weighing the testimony of one Bud Frederickson greater care should be exercised because he was an informer or undercover man.

In Garcia v. State, *supra*, this court held: "The mere fact that a witness in a criminal prosecution is a regular public law enforcement officer does not entitle an accused to an instruction that the jury, in weighing his testimony, should exercise greater care than in weighing the testimony of other witnesses.

"Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested."

In Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, this court held: "The rule that if a person is employed to produce evidence against the accused and he testifies against the accused, the defendant is entitled to an instruction to the jury that in weighing the testimony of the witness greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested, is generally not applicable to public officers who are witnesses."

The record discloses without dispute that all police officers, detectives, criminal investigators, and safety patrolmen who testified as witnesses for the State were regular public law enforcement officers employed by the city of Valentine, Cherry County, or the States of Nebraska and South Dakota. Contrary to defendant's contention, there is no evidence whatever that one Jack Knudtson was ever employed, rewarded, or paid by anyone as a criminal investigator or detective to produce evidence against defendant. He had once been a safety patrolman but was then a druggist, and, like many other citizens in the community, he voluntarily gave assistance after the death of patrolman Hansen. In that connection also, contrary to defendant's contention, Bud Frederickson was not an informer or undercover man employed, rewarded, or paid by anyone to produce evidence against defendant. He was simply a private citizen who in performing his civic duty voluntarily gave information and assistance to regular public law enforcement officers after defendant and Leon had informed him of their unlawful activities. We conclude that defendant's requested instructions Nos. 3, 4, 17, and 26 were not erroneously refused.

Defendant argued that the trial court erred in refusing to give his requested instruction No. 6 relating to duties of the jury in arriving at a verdict, and instruction No. 10 relating to the presumption of defendant's innocence. It is sufficient for us to say that the substance of such requested instructions appears in other instructions given by the trial court, particularly in instructions Nos. 3, 26, and 28. Defendant's contention should not be sustained.

Defendant argued that the trial court erred in refusing to give his tendered instruction No. 16 which purported to submit the lesser charge of assault and battery. As stated in 41 C. J. S., Homicide, § 396, p. 232: "In a homicide prosecution, it is not proper to give an instruction as to assault in any of its grades

unless such instruction is applicable and authorized by the evidence." In Clarence v. State, 89 Neb. 762, 132 N. W. 395, it is said: "The eighth instruction asked and refused was to the effect that the jury might find defendant guilty of assault and battery, if they believed the evidence so warranted. This was properly refused, as there was no evidence which could require the instruction to be given." See, also, Mantell v. State, 141 Neb. 15, 2 N. W. 2d 586; State v. Johnston, 221 Iowa 933, 267 N. W. 698. Such authorities are applicable and controlling in the case at bar. Defendant's contention should not be sustained.

Defendant argued that the prosecutor was guilty of misconduct in final argument by appealing to the passion and prejudice of the jury which deprived defendant of a fair trial and required reversal. In that connection, instruction No. 1 told the jury: "In determining any of the questions of fact presented in this case you must be guided solely by the evidence introduced at the trial. The jury has no right to indulge in speculations, conjectures or inferences not supported by the evidence or consider any evidence that has been offered and excluded or ordered stricken or deleted during the progress of the trial. Neither are the opening statements, remarks or arguments of counsel or the rulings and remarks of the Court evidence."

It is elementary that; "* * * the prosecutor may state conclusions which are predicated upon the evidence" and unless an error in argument complained of was prejudicial to the rights of a defendant, the cause should not be reversed. Dobry v. State, 130 Neb. 51, 263 N. W. 681.

In Lee v. State, 124 Neb. 165, 245 N. W. 445, this court held: "'An appeal for conviction based altogether upon the evidence, however fervent it may be is not an abuse of the privilege of advocacy.' Parker v. State, 67 Neb. 555.

"It is not misconduct on part of the prosecuting at-

torney, but is indeed his duty, to comment on the conduct and credibility of defendant's witnesses, based on evidence and facts properly before the court.

"Remarks in his argument by the county attorney brought about and made in answer to the arguments of prisoner's counsel, unless necessarily prejudicial to the accused, do not necessitate the reversal of a conviction."

In that regard, section 29-2308, R. R. S. 1943, specifically provides in part: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

In the light of such rules and others hereinafter discussed, we deem worthy of discussion only that part of the closing arguments of the special prosecutor hereinafter set forth to which defendant made objections and moved for mistrial, which were overruled by the trial court. In that respect also, no request ever was made by defendant's counsel for an instruction telling the jury to disregard any part of the closing argument. In the case at bar, it was the duty of the jury, if defendant was found guilty of first degree murder to fix the penalty, at either death or imprisonment in the penitentiary during life "in the discretion of the jury" which whole matter was committed by statute to the judgment and conscience of the jury. Sundahl v. State, *supra*. Thus, we call attention to the fact that the closing argument of the special prosecutor discussed herein related solely to the penalty to be imposed if the jury found defendant guilty of first degree murder. With relation thereto, the special prosecutor said: "Do you think it is possible and right that this man should have gone down there to the penitentiary of Nebraska where the meals will perhaps be better than he had in

the jail, and the beds will perhaps be better, where under our Constitution and our laws he has the legal right to attempt to get before the Board of Pardons and Parole * * * and present to them a plea for clemency, and at which you or I or the people that really know about this thing would probably not be present, because you do have the right to know that the Constitution and laws of this State create a Borad (Board) of Pardons and Parole to pass upon those cases and determine whether or not prisoners * * * this prisoner's sentence should be commutted (commuted) or whether there should be a parole, and now those are things, among others, which you have a right to know in determining what ought to be done in this case."

That part of the statement with regard to meals and beds in the jail was predicated upon defendant's complaints with regard thereto appearing in his own evidence. Such remarks could not be prejudicial. We are primarily concerned with the special prosecutor's remarks about pardon or parole.

In Sundahl v. State, *supra*, we said: "Pardon or parole relates to something that may happen after conviction and to action by the executive department. The jury had nothing to do with relation to the punishment except to determine whether it should be death or imprisonment for life. In the event the decision was for life imprisonment, whether or not he should be later paroled or pardoned was not a matter for it to decide. The jury's task at that point was to choose between one or the other of the penalties. That decision should not rest upon whether parole was easy or difficult to secure." By analogy, it was improper for the prosecutor to make the statement heretofore set forth with regard to pardon or parole, and it was error to do so. The question here is whether or not it was prejudicial error. We conclude that it was not prejudicial error in a case such as that at bar where the jury is required to fix the penalty if it found defendant guilty of murder in the first degree.

because the argument of the prosecutor was simply a statement of existing constitutional and statutory law which all men, including the jurors, were presumed to know and doubtless did already know about before the statement was made. It will be noted that no statement was made by the prosecutor that pardon or parole was easy or difficult to secure or that actually or by statistical comparison with other cases defendant would be able to present a plea to the board and obtain a hearing or obtain a pardon or parole. He simply said that defendant had a legal right to attempt to present a plea therefor to a lawfully created Board of Pardons. Such statement was unaccompanied by any other objectionable or prejudicial remarks. Under the circumstances in this case, the statement as made should not require reversal. It would be a perversion of truth and justice to hold otherwise. Those conclusions are supported by Frady v. People, 96 Colo. 43, 40 P. 2d 606, 96 A. L. R. 1052; Sullivan v. State, 47 Ariz. 224, 55 P. 2d 312; State v. Buttry, 199 Wash. 228, 90 P. 2d 1026; Powell v. Commonwealth, 276 Ky. 234, 123 S. W. 2d 279; 23 C. J. S., Criminal Law, § 1107, p. 586; 24 C. J. S., Criminal Law, § 1902, p. 896.

Defendant also complained about other statements which were either conclusions of the prosecutor predicated upon the evidence or reasonable inferences therefrom, or were remarks not necessarily prejudicial, made in answer to arguments of defendant's counsel, or were statements which could not upon any theory have been prejudical or to which no proper objections were made. They require no further discussion except to point out that in a homicide case the prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree and the scope of his argument in that regard should be given a broad latitude, provided it is predicated upon the evidence or reasonable inferences therefrom.

Finally, defendant argued that unless the verdict and

judgment herein were reversed, this court should reduce the sentence under the provisions of section 29-2308, R. R. S. 1943, upon the ground that there was a great deal of sentiment and prejudice worked up against defendant in Valentine and the immediate vicinity and that the alleged crime happened rapidly without premeditation or plan to kill the patrolman. In that regard, insofar as this record discloses, no request was ever made by defendant for a change of venue. Further, the record contains ample competent evidence of premeditation. There is competent evidence that defendant had armed himself for the express purpose of resisting arrest or apprehension, and when the patrolman attempted to arrest him he carried out his premeditated plan and killed the patrolman, knowing him to be an officer, in an attempt to escape and avoid prosecution for state and federal offenses admittedly theretofore committed by him. The record discloses that defendant had a fair trial and it abounds with competent evidence, not the least of which are defendant's own confessions, statements, and evidence, all of which amply support the jury's conclusion that defendant was guilty of first degree murder and that the penalty should be death as provided by law.

This court discussed at length section 29-2308, R. R. S. 1943, and its application in Sundahl v. State, *supra*, and MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45, certiorari denied 323 U. S. 804, 65 S. Ct. 559, 89 L. Ed. 642. Applicable conclusions reached therein need no repetition here. It is sufficient for us to say that because they were warranted by the evidence, we find no justifiable reason for substituting our judgment for that of the jury and the trial court by changing the verdict of the jury fixing the penalty at death, or the judgment and sentence of the trial court rendered in conformity therewith. Finding no prejudicial error in the record, we conclude that the judgment of the district court should be and hereby is in all respects affirmed.

Friday, March 30, 1956, between the hours of 6 a. m. and 6 p. m. of said day is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.